Opinion issued August 29, 2023

In The

Court of Appeals

For The

First District of Texas

NO. 01-22-00666-CV

AMERICAN ZURICH INSURANCE COMPANY, Appellant

V.

KELVIN MILLER, Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Case No. 2018-01504

MEMORANDUM OPINION

Appellee Kelvin Miller sustained injuries when he fell from an elevated railroad track as he walked along the track to get breakfast while his work truck was being unloaded. Miller claimed the injury occurred in the course and scope of his employment. Appellant American Zurich Insurance Company disputed the

compensability of Miller's injury, arguing he was not injured in the course and scope of his employment. The Texas Department of Insurance Division of Workers' Compensation held a contested case hearing and concluded Miller was not injured in the course and scope of his employment and thus had not sustained a compensable injury. Miller appealed the adverse decision, first to the Division's appeals panel, which did not issue a decision rendering the Division's opinion final, and then to the trial court seeking judicial review of the Division's final administrative decision.

After considering the parties' cross motions for summary judgment, the trial court held that Miller was acting in the course and scope of his employment when he sustained his injuries and that Miller had a disability from the date of his injury through the date of the contested hearing. The trial court denied Zurich's motion for summary judgment, granted Miller's summary judgement, and entered a final judgment in favor of Miller.

In two related issues, Zurich contends the trial court erred (1) in finding that Miller sustained a compensable injury, and (2) in failing to find that Miller's actions constituted a personal deviation from the course and scope of his employment.

We affirm.

Background[1]

Miller worked as a commercial truck driver for Commercial Metals Company ("CMC"). His work day typically began at 5:00 a.m. and ended at 5:00 or 5:30 p.m., although at times he could work up to 14 hours a day. CMC expected Miller to deliver three loads of materials per day. On a routine day, Miller would drive his personal car to the CMC shop in the morning and he would then use his assigned truck for work. Because Miller's truck did not have a bathroom or a refrigerator, it was understood that during the day, Miller would have to leave his truck to find a bathroom or something to eat and drink, as needed.

The events leading up to the accident are largely undisputed. On February 3, 2017, Miller arrived at his CMC job site between 5:00 and 5:15 a.m. At about 6:00 a.m., he left the CMC shop with a load of rebar and drove to Rosenberg, Texas for his first delivery of the day. When he arrived at the delivery site located at State Highway 59 South and FM 762, the recipients of the load were not prepared to unload the truck. Miller had not eaten breakfast that morning. Between 7:15 and 7:20 a.m., he placed his truck in sleeper berth status[2] and walked to a nearby Chase

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1 The background facts are primarily derived from the Texas Department of Insurance Division of Workers' Compensation contested case hearing, the decision issued by the contested case hearing officer, and a recorded statement Miller gave Zurich nine days after he was injured.

2 Drivers can make log entries for "on duty," "driving," "sleeper berth," and "off duty." Zurich does not dispute that Miller put his truck into sleeper berth status at around 7:15 a.m.

Bank to get some cash to purchase a honeybun and something to drink at a neighboring convenience store.[3]

Miller decided to walk across an elevated railroad track that runs perpendicular to and over State Highway 59 (the "railroad bridge"), because it was the fastest route to the convenience store and bank, and he did not feel it was safe to cross the six-lane freeway. Miller claimed he did not see any barricades, warning signs, or safety personnel telling him not to cross the railroad bridge.[4] He testified he had walked across the same elevated railroad bridge once before by stepping from cross tie to cross tie.

Miller had walked more than halfway across the railroad bridge, directly above the freeway, when an [oncoming] "train just appeared out of nowhere." There was nothing on the railroad bridge for pedestrian traffic. Miller knelt by the side of the tracks and held onto the concrete side of the bridge to avoid getting hit

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[3] According to Miller's recorded statement, taken on February 12, 2017, he arrived at the delivery site at 7:00 a.m. and was "sitting in line" from about 7:00 a.m. until 8:30 a.m., and the accident occurred at approximately 9:30 a.m. According to Miller's testimony at the September 14, 2017 contested case hearing, he arrived at the delivery job site at approximately 7:00 a.m. and the accident occurred soon after. Miller's summary judgment motion indicates he waited for an hour after arriving at the delivery jobsite before setting out to get food. The driver log note entries indicate he went on duty at around 5:55 a.m. to get his load and he arrived at the customer location at around 6:40 a.m. for unloading. He logged "sleeper berth" at 7:15 a.m.

[4] In the trial court, Zurich argued there was a sign announcing private property and prohibiting trespass at the start of the railroad bridge, but Zurich "did not dispute [Miller] may not have seen any warning signs."

by the train. Miller was swept off the railroad bridge by the force of the passing train. Miller stated that "when the train blew by [him], that's when [he] lost [his] footing" and he fell approximately 25 feet onto Highway 59 into oncoming traffic, "sustaining traumatic injuries."[5] Miller was taken by ambulance to the hospital. He remained in the intensive care unit for about two months and underwent 11 surgeries. Miller was told he likely will never drive again because of his foot injuries.

A. Administrative Review Process

Miller sought Workers' Compensation coverage for his injuries, arguing his injury occurred in the course and scope of his employment. Zurich, the workers' compensation insurance carrier, disputed the compensability of Miller's injuries, alleging he was not injured in the course and scope of his employment.

A hearing officer for the Texas Department of Insurance Division of Workers' Compensation ("DWC" or "Division") held a hearing on September 14, 2017 to determine two contested issues:[6] (1) whether Miller had sustained a compensable injury on February 3, 2017; and (2) whether Miller had a disability resulting from the claimed injury. In a written opinion issued on September 20, 2017, the hearing officer held that while Miller had "testified credibly" and

[5] Miller's right ankle and right wrist were "shattered," his left kneecap was fractured, and he required a tendon replacement in his right arm.

[6] Two witnesses testified during the contested case hearing: Miller and Rochel Mitchell, a CMC truck driver who performed the same duties as Miller.

"sustained an unfortunate injury," the injury was not compensable because Miller "had deviated from the course and scope of his employment and was on a purely personal errand" when he was injured. In response to the second issue, the hearing officer determined that Miller was unable to obtain and retain employment at wages equivalent to his CMC wages as a result of the injuries he sustained in the accident. But because Miller's inability to obtain and retain employment was not the result of a compensable injury, Miller did not have a disability as defined under the statute.[7]

Miller appealed the hearing officer's adverse determination to the DWC Appeals Panel. The Appeals Panel did not issue a new decision, rendering the September 20, 2017 hearing officer's decision a final administrative decision of the DWC. *See* TEX. LABOR CODE § 410.204(c) ("If the appeals panel does not issue a decision in accordance with this section, the decision of the administrative law judge becomes final and is the final decision of the appeal panel.") The DWC notified Miller of the finality of the decision on November 21, 2017.

B. Judicial Review in the Trial Court

On January 8, 2018, Miller filed suit against Zurich in Harris County District Court, seeking judicial review of the DWC's final administrative decision. Miller

[7] Section 401.011(16) of the Texas Labor Code defines "disability" as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." TEX. LABOR CODE § 401.011(16).

requested that the trial court determine "Miller was in the course and scope of his employment on or about February 3, 2017, when he suffered his injuries."

Zurich filed a general denial and moved for a hybrid summary judgment, arguing there was no evidence or legally insufficient evidence Miller had sustained a "compensable injury" as that term is defined by the Workers' Compensation Act because Miller was not acting in the course and scope of his employment when he was injured. Miller filed a response in opposition to Zurich's motion for summary judgment and moved for partial summary judgment on the issue of course and scope.

The trial court denied Zurich's motion for summary judgment and granted Miller's motion for partial summary judgment, holding Miller "was acting in the course and scope of employment when he was injured." The trial court signed a final judgment holding (1) Miller had sustained a compensable injury on February 3, 2017, and (2) Miller had a disability from February 4, 2017 through September 14, 2017, the date of the contested DWC hearing.[8]

This appeal followed.

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[8] The parties did not argue or dispute the issue of disability in their summary judgment motions. That is, they did not dispute that Miller was unable to obtain and retain employment at wages equivalent to the pre-injury wage from the time of injury through the date of the DWC contested case hearing. The only contested issue before the trial court, and before us on appeal, is whether Miller was in the course and scope of his employment when he fell from the railroad bridge on February 3, 2017.

Discussion

A. Standard of Review

The Texas Workers' Compensation Act[9] (the "Act") provides that after exhausting all its administrative remedies, a party "aggrieved by a final decision of the [DWC] appeals panel" may seek judicial review of the panel's final decision. TEX. LABOR CODE § 410.251; *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 398 (Tex. 2000). Section 410.301 of the Act governs judicial review of panel decisions "regarding compensability or eligibility for the amount of income or death benefits." TEX. LABOR CODE § 410.301. Whether an employee was injured in the course and scope of employment is a question of compensability. *Morales v. Liberty Mut. Ins.*, 241 S.W.3d 514, 517 (Tex. 2007). Judicial review of compensability decision is "limited to issues decided by the appeals panel." TEX. LABOR CODE § 410.302; *State Office of Risk Mgmt. v. Joiner*, 363 S.W.3d 242, 246 (Tex. App.—Texarkana 2012, pet. denied).

The Act provides two separate standards of judicial review: (1) a modified de novo standard and (2) the substantial evidence rule. *Croysdill v. Old Republic Ins.*, 490 S.W.3d 287, 292–93 (Tex. App.—El Paso 2016, no pet.) (explaining standards of review under the Act). If a party seeks review of a final decision regarding compensability or eligibility of benefits, the modified de novo standard

[9] *See* TEX. LABOR CODE § 401.001, *et seq.*

applies. TEX. LAB. CODE § 410.301; *Tex. Prop. & Cas. Guar. Ass'n v. Nat'l Am. Ins. Co.,* 208 S.W.3d 523, 530–31 (Tex. App.—Austin 2006, pet. denied). Under this standard, all issues regarding compensability or eligibility for benefits may be tried. *Tex. Workers' Comp. Comm'n v. Garcia,* 893 S.W.2d 504, 528 (Tex. 1995). The trier of fact considers the appeals panel's decision but is not required to give that decision any particular weight. *Joiner*, 363 S.W.3d at 247 (citing *Garcia*, 893 S.W.3d at 515). The records of the contested case hearing are also admissible. TEX. LABOR CODE § 410.302(a). The party seeking judicial review of an appeals panel decision bears the burden of proof by a preponderance of the evidence. *Id.* § 410.303; *Joiner*, 363 S.W.3d at 246–47.

We review all rulings on summary judgments de novo. *Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 661 (Tex. 2005). When a party moves for both traditional and no-evidence summary judgment, we first review the trial court's ruling under the no-evidence standard of review. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the trial court properly granted the no-evidence motion, we need not analyze the arguments raised in the traditional summary judgment motion. *Id.*

After an adequate time for discovery has passed, a party may move for a no-evidence summary judgment asserting that no evidence exists to support one or more essential elements of a claim on which the adverse party bears the burden of

proof. TEX. R. CIV. P. 166a(i); *see LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006). The burden then shifts to the nonmovant to produce evidence raising a genuine issue of material fact on the challenged elements of his claim. TEX. R. CIV. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). A no-evidence summary judgment is improper if the nonmovant brings forth more than a scintilla of probative evidence raising a genuine issue of material fact. *Forbes Inc. v. Granada Bioscis., Inc.*, 124 S.W.3d 167, 172 (Tex. 2003).

"Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion' of a fact." *Id.* (quoting *King Ranch v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003)). More than a scintilla of evidence exists if the evidence would allow reasonable and fair-minded people to differ in their conclusions. *Id.* Unless the nonmovant raises a genuine issue of material fact, the trial court must grant summary judgment. TEX. R. CIV. P. 166a(i). In determining whether sufficient evidence exists to defeat a no-evidence summary judgment, we review the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *King Ranch*, 118 S.W.3d at 751.

In our review of a traditional summary judgment, we accept as true all competent evidence favorable to the nonmovant, indulging every reasonable inference, and resolving any doubts in the nonmovant's favor. *Sw. Elec. Power*

Co. v. Grant, 73 S.W.3d 211, 215 (Tex. 2002). To prevail on a traditional summary judgment motion, the movant must establish that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c).

When, as here, both parties move for summary judgment, the appellant may challenge the trial court's denial of its own motion as well as the judgment in favor of the prevailing party. *S. Ins. Co. v. Brewster*, 249 S.W.3d 6, 15 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *CU Lloyd's of Tex. v. A. Feldman*, 977 S.W.2d 568, 569 (Tex. 1998)). We review the summary judgment evidence proffered by both parties, determine all questions that were presented, and "render the judgment that the trial court should have rendered." *Id.* (citing *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000)); *Castillo Info. Tech. Servs., LLC v. Dyonyx, L.P.*, 554 S.W.3d 41, 45 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

B. Compensability Under the Act

The issue in this case is whether Miller suffered a compensable injury entitling him to workers' compensation benefits. The existence of a compensable injury is the threshold requirement for payment of benefits under the Act. TEX. LABOR CODE § 401.011(5) (defining benefit as a medical, income, death, or burial benefit "based on a compensable injury"). If Miller was not in the course and

scope of employment when he was injured, he did not suffer a compensable injury and is thus not eligible for benefits under the Act. *Id.* § 406.031(a) (providing insurance carrier is liable for compensation under the Act if an injury arises "out of and in the course and scope of employment").

Zurich appeals the trial court's granting of Miller's motion for summary judgment and the trial court's denial of its own motion for summary judgment on the issue of course and scope. Both motions turned on whether Miller was acting in the course and scope of his employment when he was injured, as that finding determines whether Miller has a legally compensable injury.

The Act defines "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable" under the Act. *Id.* § 401.011(10). The Act defines "course and scope of employment" in relevant part as:

> an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations. The term does not include:
>
> (A) transportation to and from the place of employment unless:
>
> (i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;

> (ii) the means of the transportation are under the control of the employer; or
>
> (iii) the employee is directed in the employee's employment to proceed from one place to another place[.]

Id. § 401.011(12).[10] Thus, two elements must be satisfied to establish an employee was acting in course and scope. The injury must "(1) relate to or originate in the employer's business, and (2) occur in the furtherance of the employer's business." *Davis v. Tex. Mut. Ins. Co.*, 443 S.W.3d 260, 267 (Tex. App.—Dallas 2014, pet. denied).

There is no bright-line rule as to what constitutes course and scope in a workers' compensation case. *See, e.g.*, *Tex. Mut. Ins. Co. v. Jerrols*, 385 S.W.3d 619, 627 (Tex. App.—Houston [14th Dist.] 2012, pet. dism'd) ("In part, the absence of a bright-line rule reflects the unavoidably fact-specific nature of the inquiry into course and scope."); *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 643 (Tex. 2015) (observing course-and-scope analysis is generally "fact-intensive . . . focusing on the nature of the employee's job, the circumstances of the travel, and any other relevant facts."); *N.H. Ins. Co. v. Dominguez*, 661 F. App'x 267, 270 (5th Cir. 2016) ("There is no bright line rule in the fact-intensive 'course and scope' inquiry.") (interpreting Texas law).

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[10] The course and scope definition under Section 401.011(12)(A) is known as the "coming and going" rule. *Zurich Am. Ins. Co. v. McVey*, 339 S.W.3d 724, 728 (Tex. App.—Austin 2011, pet. denied).

C. The Parties' Summary Judgment Motions

Zurich filed a hybrid motion for summary judgment arguing there was no evidence or legally insufficient evidence Miller had sustained a "compensable injury," because Miller was not acting in the course and scope of his employment when he was injured.[11] Zurich argued that Miller "made a significant deviation from his work duties as a truck driver when he left his vehicle unattended at the delivery job site to run a personal errand to obtain cash and buy breakfast." Zurich argued that "as a matter of law," Miller's actions "did not arise out of activity that could be considered ordinarily or reasonably inherent to or incident to the conduct of his work as a truck driver." Zurich also argued Miller had broken the law because he trespassed when he walked across the railroad bridge. Zurich attached as evidence the DWC Certification of Instruments,[12] excerpts from the transcript of Miller's sworn testimony during the contested case hearing, the DWC administrative law judge's decision, three Zurich exhibits admitted into evidence during the contested case hearing, and five photos of the railroad crossing and scene of the accident. The Zurich exhibits admitted into evidence during the

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[11] Zurich did not dispute that as a result of his injuries, Miller was unable to obtain and retain employment at wages equivalent to his CMC wages from the date of the accident through the date of the contested case hearing before the DWC.

[12] The certificate of instruments is similar to a business record affidavit. It contains the signature of the Commissioner of the Division of Workers' Compensation, who swore the attached documents were true and correct copies of the documents in the *Miller v. American Zurich Insurance Company* file, which were maintained by or within the authority of the DWC.

contested case hearing were Miller's recorded statement to a Zurich representative, a letter from BNSF Railway Company that stated Miller trespassed on the railroad bridge, and a statement from CMC's area safety coordinator.[13]

Miller filed a response to Zurich's motion and a traditional motion for partial summary judgment "on the primary issue in dispute that [he] was in the course and scope of his employment at the time of his injuries[.]" Miller argued that his action in walking to the bank and convenience store to get food for breakfast while his truck was being unloaded was not a deviation, but rather the type of incidental activities the Texas Supreme Court has held are necessary for "traveling employees such as truck drivers." Miller attached as summary judgment evidence the transcript of the contested case hearing, his DWC-1 Employer's Report of Injury, photos of the accident area and an overhead map, his driver log entries for the date of the injury, the "Interstate Truck Driver's Guide to Hours of Service," and the contested case hearing decision.

Both parties incorporated their summary judgment motions by reference in responding to the other side's motion for summary judgment.

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[13] CMC's area safety coordinator, Rene R. Cano, gave a written statement in which she recalled learning of the accident, visiting the accident scene, talking to employees at the job site, and visiting on two occasions with Miller in the hospital.

D. Analysis

In its first issue, Zurich argues the trial court "erred in finding as a matter of law that Miller sustained a compensable injury" and that a jury should decide "[w]hether Miller's actions constituted a personal deviation from the course and scope of his employment sufficient to remove him from the furtherance of the employer's business." In his second issue, Zurich argues the trial court "erred as a matter of law in denying [Zurich's] motion for summary judgment as Miller's actions on the date of injury were sufficiently egregious to constitute a personal deviation from the course and scope of his employment as a matter of law." Because both of his issues turn on whether a "personal deviation" took Miller out of the course and scope of employment when he was injured, we address the issues together.

The parties generally agree on the circumstances of Miller's injury. It is undisputed that during the early morning hours of February 3, 2017, Miller drove his company truck from Houston to a job site in Rosenberg, Texas; he placed his truck on sleeper berth waiting for it to be unloaded; during the lag time he decided to cross over the railroad bridge to get money and something to eat and drink on the other side of Highway 59; and as he walked across the railroad bridge, he fell 25 feet onto Highway 59, sustaining serious injuries. The parties disagree, however, as to whether Miller sustained a "compensable injury." They dispute

whether Miller was in the course and scope of his employment when he was injured. In his motion for summary judgment, and in response to Zurich's summary judgment motion, Miller asserted that "[d]uring his truck driving time as a Commercial Truck Driver (CDL) licensed for CMC . . . it was understood that he would get something to eat, use the bathroom during the driving workday." Miller testified during the DWC contested case hearing that he routinely worked from 5:00 a.m. to 5:00 or 5:30 p.m. He testified:

> Q: And during that time is it understood that you're going to eat?
>
> A: Yes.
>
> Q: And during that time is it understood that you're going to use the bathroom?
>
> A: Yes.
>
> . . .
>
> Q: Okay. And do you have a bathroom in your truck?
>
> A: No, we do not.
>
> Q: And do you have a kitchen or a refrigerator in your truck?
>
> A: No, ma'am.
>
> Q: Okay. And has your Employer ever said to you, while you're out on the road from 5:00 a.m. to 5:30 p.m., you can't eat?
>
> A: No.
>
> Q: Okay. And . . . has the Employer ever said while you're out on the road from 5:30 a.m. to 5:30, you can't go to the bathroom?

A: No.

Q: Okay. So during that time period while you're out working and driving your truck, how would you eat or go to the bathroom or perform any of the – the normal things that you needed to do – that a person would need to do in a day, how – how do you do that?

A: You would actually – like I say, on the job site if you're going to be there for a consecutive time, you will just walk from the . . . truck and go get something to eat.

Q. So you would–and was that permitted?

A: Yes.

. . .

Q: And was that a common practice in your company?

A: Yes, ma'am.

Rochel Mitchell ("Mitchell"), also a CDL truck driver at CMC, testified similarly during the contested case hearing. In response to questioning by Miller's counsel, she testified:

Q: Were you allowed to get something to eat while you were out on the road?

A: Yes.

Q: Okay. And were you allowed . . . to go to the bathroom?

A: Yes.

Q: Okay. And was – did your Employer understand that while you were waiting for your truck to be unloaded, you would have to sometimes leave to go get food or something to drink or go to the bathroom?

A: Yes.

Q: And did your Employer ever say that you couldn't do that?

A: No.

Miller testified that at the time of the accident, he was

> [g]oing over to the other side [of the highway] to get cash, because all the other stores that was [sic] on the other side, they were – I didn't figure they were open at that time of morning; so I was going over there to the bank to get some cash to get some – you know, Honey Bun and get some juice, get something [to] drink.

Miller explained during the hearing that drivers can choose from four driving categories for their daily driving logs: "(1) off duty," when a driver is relieved of all duties and responsibilities for performing work and is allowed to "pursue activities of [his] own choosing and be able to leave the place where [the] vehicle is parked"; (2) "driving," when the driver is heading to or leaving his destination; (3) "on duty not driving," when the driver is on the job but not driving; and (4) "sleeper berth," when the driver is waiting while on the job. For example, if he drives to a destination and has to wait for his delivery to be unloaded, he "automatically go[es] to sleeper berth," instead of "driving mode" and he's "[s]till on the job." Because he is not in "driving mode," the time Miller sits at the job delivery destination is not subtracted from his 14-hour daily driving limit.

Mitchell confirmed the use of "sleeper berth" as explained by Miller. She testified that when a driver is on "sleeper berth," the driver is still considered to be

working. When asked to explain why, she responded: "Because I'm just waiting to get unloaded or waiting for the load the sign at – until they tell me my next thing to do."

Miller's driver log entries were attached to his motion for summary judgment. They indicate that on the day of the accident, Miller went on duty at 5:55 a.m., he arrived at the customer location for unloading at 6:40 a.m., and he went "from 'driving' log to 'on duty' (not driving) to 'sleeper berth'" mode at 7:15 a.m.[14] Zurich did not dispute these log entries. Instead, in its response to Miller's summary judgment motion, Zurich argued that because Miller was going to be away from his truck for more than 30 minutes, the proper log entry was "off duty," and that if he planned to be away from his truck for less than 30 minutes, the proper entry would have been "on duty, not driving." But Zurich did not offer any evidence to establish Miller was not allowed to leave his truck or the premises of a job site to obtain food and drink during the driving day. Thus, regardless of whether the time entries were correctly identified in Miller's driving log, we are not persuaded by this argument.

1. The Personal Comfort Doctrine

To the extent Miller was not in or near his truck when he was injured, we note that an employee is not necessarily "deprived of the benefits of workers'

[14] The driver log attached to Miller's motion for summary judgment is difficult to read, but Zurich does not dispute the indicated time for the entries.

compensation merely because he was not actually working when the accident occurred." *Lujan v. Hous. Gen. Ins. Co.*, 756 S.W.2d 295, 298 (Tex. 1988). For example, under the personal comfort doctrine, an employee who is not working in the capacity for which he was hired at the time of injury may still be found to be in the course and scope of his employment. The personal comfort doctrine provides that "an employee, while in the course of her employment, may perform acts of a personal nature that a person might reasonably do for her health and comfort, such as quenching thirst or relieving hunger." *Reagan v. Fid. & Cas. Co. of New York*, No. 01-96-00036-CV, 1996 WL 433682, at *5 (Tex. App.—Houston [1st Dist.] Aug. 1, 1996, writ denied) (not designated for publication) (citing *Lujan*, 756 S.W.2d at 298). As several of our sister courts have noted, the personal comfort doctrine is explained in *Larson's Workmen's Compensation Law* treatise:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

1A ARTHUR LARSON, LARSON'S WORKMEN'S COMPENSATION LAW § 21.00 (1990).[15] "The courts of this state have recognized and applied the personal

[15] *See Tex. Workers' Comp. Ins. Fund v. Rodriguez*, 953 S.W.2d 765, 767 n.4 (Tex. App.—Corpus Christi–Edinburg 1997, pet. denied); *Emps.' Cas. Co. v. Bratcher*, 823 S.W.2d 719, 721 (Tex. App.—El Paso 1992, writ denied).

comfort doctrine in making a determination as to whether an injury was sustained in the course of employment." *Emps.' Cas. Co. v. Bratcher*, 823 S.W.2d 719, 721 (Tex. App.—El Paso 1992, writ denied). The doctrine applies if two criteria are met: the employee's injury occurs within the course and scope of the job, and the injury would not have occurred but for the employment obligations that placed the employee in danger. *Id.*

Miller relies on *Texas Workers' Compensation Insurance Fund v. Rodriguez*, 953 S.W.2d 765 (Tex. App.—Corpus Christi–Edinburg 1997, pet. denied), a personal comfort doctrine case. Rodriguez worked for an offshore safety equipment company ("BPC") that provided its employees two ten-minute breaks each day in addition to lunch. *Id*. at 766. Rodriguez punched in each morning, punched out for lunch, punched in after lunch, and punched out at the end of the workday. *Id.* He did not have to punch in or out for his ten-minute breaks, during which time the employees, including a company vice president, often tossed a football around on BPC's premises. *Id.* Rodriguez considered the football tossing a "social activity" that was not part of his job, although it was done with the permission of his supervisors. *Id.*

During one such game, Rodriguez was injured. *Id.* at 767. He was off work for some time and then returned to lighter duty. *Id.* Later, he was fired after missing additional work while recovering from surgery for the injury. *Id.*

Rodriguez sought workers' compensation benefits. *Id.* After a DWC contested hearing, the hearing officer ruled that Rodriguez was not in the course and scope of employment when he was injured. *Id.* The appeals panel reversed the hearing officer's decision, holding that Rodriguez was injured in the course and scope of his employment under the personal comfort doctrine. *Id.*[16]

The Texas Workers' Compensation Insurance Fund ("Fund") filed suit against Rodriguez, seeking judicial review of the appeals panel's decision. *Id.* The trial court granted Rodriguez's motion for summary judgment and denied a summary judgment motion filed by the Fund. *Id.* The court of appeals affirmed, concluding that Rodriguez's short break was in furtherance of the employer's business, "because to be grinding unceasingly at the tasks assigned by his employer without any breaks would be a hazard to himself and others and would not be the most efficient means of conducting his employer's business." *Id.* at 769. The court held that while Rodriguez was on a break, he was in furtherance of his employer's business: "That he was tossing a football or walking across the shop's yard is not material." *Id.* The court further held that given that BPC knew the employees tossed the football during the breaks, gave permission to do so, and a

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[16] The court also found Rodriguez was injured in the course and scope of his employment under the recreational or social activity doctrine. *Rodriguez*, 953 S.W.2d at 767. We do not address that doctrine as neither party argued it here.

company vice-president participated, the act of tossing the football during his breaks "was a reasonable expectancy of his employment." *Id.*

The same logic applies here. Miller testified he works a 12-hour shift from 5:00 a.m. to approximately 5:30 p.m., and at times he can work up to 14 hours. His truck does not have a bathroom and it does not have a refrigerator to store food. His testimony, as well as Mitchell's testimony, was uncontested that during this 12 to 14-hour daily shift, CDC truck drivers are permitted to get food and use bathroom facilities, and they understood this was allowed by their employer while they remained on duty. Leaving his truck to find food and drink was thus a "reasonable expectancy" of Miller's employment, and the summary judgment evidence is undisputed that at a minimum, Miller's employer was aware of this activity and did not prohibit such conduct.

The Supreme Court's reasoning in *Yeldell v. Holiday Hills Retirement and Nursing Center, Inc*., 701 S.W.2d 243 (Tex. 1985) also is instructive. Yeldell, a licensed vocational nurse, was working in a retirement home when, during her regular shift, she called her daughter. *Id.* at 244–45. When she hung up the phone, the telephone cord became entangled with a large coffee urn that overturned and spilled hot coffee over her, resulting in second- and third-degree burns. *Id.* at 245. When Yeldell sought workers' compensation benefits, the trial court ruled in favor

of Yeldell, and the court of appeals reversed and remanded for a new trial. *Id.* at 244.

In reversing the appellate court, the Supreme Court observed that the Act should be "liberally construed in favor of the employee," and that there was nothing in the record to indicate that by talking on the telephone with her daughter, Yeldell was unable to carry out her duties:

> An employee need not have been engaged in the discharge of any specific duty incident to his employment; rather an employee in the course of his employment may perform acts of a personal nature that a person might reasonably do for his health and comfort, such as quenching thirst or relieving hunger; such acts are considered incidental to the employee's service and the injuries sustained while doing so arise in the course and scope of his employment and are thus compensable.

Id. at 245.[17] The Supreme Court held that Yeldell was in the course and scope of her duties when she was injured. *Id.* at 246.

Here, as in *Yeldell*, there is nothing that indicates Miller's attempt to get cash to buy food for breakfast prevented him from carrying out his job duties or indicated he intended to abandon the job temporarily. To the contrary, Miller was still at his first delivery job site waiting for his truck to be unloaded when he

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[17] The Court further stated, "[A] parent's telephone call to a minor child at bedtime is as reasonably necessary to a workers' well-being as quenching one's thirst or relieving hunger. It is more common than exercise or recreation as was approved in [*Southern Surety Co. v. Shook*, 44 S.W.2d 425 (Tex. App.—Eastland 1931, writ ref'd)]." *Yeldell v. Holiday Hills Ret. & Nursing Ctr., Inc.*, 701 S.W.2d 243, 246 (Tex. 1985).

decided to cross the railroad bridge to get money and something to eat. We believe the personal comfort doctrine is apt under these circumstances.[18]

2. Deviations from Employment Duties

Zurich argues the personal comfort doctrine is "not without limits" and that Miller is not entitled to relief under the doctrine because he "made a significant deviation from his work duties as a truck driver when he left his vehicle unattended at the delivery job site to run a personal errand–to obtain cash and then get breakfast." Zurich does not cite any Texas authority in support of its argument that Miller's choice to bypass a closer restaurant (that may or may not have been open), which would not have required him to cross the railroad tracks or freeway, in and of itself takes him out of the course and scope of employment. Further, Miller's uncontested summary judgment evidence establishes he was permitted to leave his truck to get food and drink and to use the bathroom during his 12- to 14-hour working day.

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[18] *See also Lujan v. Hous. Gen. Ins. Co.*, 756 S.W.2d 295, 298 (Tex. 1988) (applying personal comfort doctrine to find employee was in course and scope of employment at time of injury). In *Lujan*, the appellant was soaked with industrial paint and paint thinner while on the job and he unsuccessfully attempted to use gasoline to remove them. *Id.* at 295-96. He "went home early to bathe because the gasoline, paint, and paint thinner were causing him personal discomfort and irritation, and needed to be removed from his skin." *Id.* at 298. At home the chemicals started a flash fire, severely burning the appellant, who died from his injuries. *Id.* at 296. He was held to be in the course and scope of employment when he was burned because an employee who "reasonably performs acts of a personal nature for purposes of health and comfort" may be acting in the course of employment. *Id.* at 298.

Deviation from the course and scope of employment is a question of fact "unless the proof is such that reasonable minds can draw only one conclusion from the evidence[.]" *United Gen. Ins. Exch. v. Brown*, 628 S.W2d 505, 509 (Tex. App.—Amarillo 1982, no writ) (citing *Lesco Trans. Co., Inc. v. Campbell*, 500 S.W.2d 238, 241 (Tex. App.—Texarkana 1973, no writ)).[19] For example, the Dallas Court of Appeals concluded summary judgment evidence established a deviation, and therefore that an employee was not acting in the course and scope of his employment, where the employee sustained an injury on the way to a family dinner that was more than eleven miles from the hotel where he was staying on a business trip. *See Pinkus v. Hartford Cas. Ins. Co.*, 487 S.W.3d 616, 618, 625 (Tex. App.—Dallas 2015, pet. denied);[20] *see also Robertson Tank Lines v. Van Cleave*, 468 S.W.2d 354, 360–61 (Tex. 1971) (holding in employer liability case that employee who violated employer's orders to return truck and drove eight miles in opposite direction to visit family was not in course and scope when

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19 In other insurance contexts, courts have held some deviations "might be so gross as to destroy the initial permission as a matter of law." *See Coronado v. Emps.' Nat'l Ins. Co.*, 596 S.W.2d 502, 506 (Tex. 1979) (holding eight-hour "drinking spree" engaged in by employee who went to two bars after work while driving company truck "was so gross as to be a material deviation as a matter of law," thus outside company's automobile insurance coverage).

20 *See Tex. Mut. Ins. Co. v. Jerrols*, 385 S.W.3d 619, 628–29 (Tex. App.—Houston [14th Dist.] 2012, pet. dism'd) ("There is room to question whether the personal comfort doctrine is the correct framework for analyzing the compensability of injuries occurring in connection with travel to or from a meal at a location miles from the work premises.").

accident occurred; holding trial court properly granted judgment notwithstanding the verdict to find employee was not in course and scope); *Walker v. Tex. Emps.' Ins. Ass'n*, 443 S.W.2d 429, 430–32 (Tex. App.—Fort Worth 1969, writ ref'd) (affirming summary judgment that held driver who was shot while visiting stranger's motel room during business trip was not in course and scope of employment); *Bugh v. Emps.' Reinsurance Corp.*, 63 F.2d 36, 36–37 (5th Cir. 1933) (affirming directed verdict that held employee who died in airplane accident while flying his own plane for work purposes, unbeknownst to his employer and in violation of certain statutes, was not in course and scope of employment) (applying Texas law).[21]

Zurich asserts that deviations that take an employee's action out of the course and scope of employment "can be very minor and fact specific," such as stopping to purchase cigarettes or flashlight batteries. *See Mitchell v. Ellis*, 374 S.W.2d 333, 335–36 (Tex. App.—Fort Worth 1963, writ ref'd) (holding employee injured on his way to purchase cigarettes during work day was not in course and scope of employment); *Hudiburgh v. Palvic*, 274 S.W.2d 94, 98, 100–01 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.) (holding employee injured on way to

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[21] *See also Lewis v. J.P. Word Transfer Co.*, 119 S.W.2d 106, 107 (Tex. App.—Dallas 1938, writ ref'd) (affirming lower court's directed verdict "based upon the idea that the evidence failed to raise an issue as to whether or not [the driver] was its employee and acting within the scope of his employment at the time of the accident").

purchase batteries for his own use was not in course and scope of employment); *see also Lesco*, 500 S.W.2d at 241–42 (holding employee injured while changing oil in company truck, which was not his duty, was not in course and scope of employment).[22] Zurich also argues that Miller's sojourn was an "egregious" deviation that took him outside the course and scope of his employment when he was injured. But none of the cases Zurich cites are analogous. Miller did not depart from his duties to make personal deposits or to cash any checks at a bank, nor was Miller joining friends or family members. And he did not leave work to engage in recreational activities or to purchase cigarettes, batteries, or other personal products. He left his truck momentarily to get cash to buy food while he waited for his truck to be unloaded.

Zurich's reliance on *Drooker v. Saeilo Motors*, 756 S.W.2d 394 (Tex. App.—Houston [1st Dist.] 1988, writ denied) is misplaced. In *Drooker*, an employee who was injured on the way to dinner was held not to be in the course and scope of employment, even though he intended to return to work after dinner. *Id.* at 397–398. The *Drooker* employer presented summary judgment evidence establishing employees "ate dinner on their own time and not in furtherance of the [employers'] interests" and the employee did not present summary judgment

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[22] Zurich relies on cases from other states to argue Miller's need to get cash took him outside the course and scope of his employment, but those cases pertain to making personal deposits and cashing bonus checks at banks, which was not the case here.

evidence to the contrary. *Id.* at 397. By contrast, in the present case, Miller proffered evidence that employees were expected to eat and drink on the job, and Zurich did not offer evidence to establish otherwise.

Given the uncontroverted evidence that Miller was allowed to leave his truck to get food and drink, and given he would not have set out to do so if not for his employment obligations requiring him to wait while his truck was unloaded, we find that Miller's conduct did not constitute a deviation that took him outside the scope of his employment.[23]

3. *Shelton v. Standard Insurance*

Miller relies extensively on *Shelton v. Standard Insurance Co.*, 389 S.W.2d 290 (Tex. 1965). While not identified as a personal comfort doctrine case, we believe it is persuasive. Shelton made three round trips driving a truck for his employer from Abilene, Texas to Wichita, Kansas. *Id.* at 291. The total time of each trip was approximately 33 hours, so Shelton was expected to sleep, eat, and drink en route. *Id.* at 291–92. On the fourth trip, he was instructed to change trucks in Dallas on the way to Wichita, but he developed battery trouble on the way to Dallas. *Id.* at 292. In Dallas, Shelton learned the new truck would not be available until the following morning, so he checked into a motel. *Id.* As he

[23] We do not hold that the personal comfort doctrine is applicable in every case in which an employee leaves his workplace to get food and drink, even with the employer's permission. Our holding is limited to the facts before us.

crossed the street to get something to eat, he was struck by a car and injured. *Id.* The trial court granted the workers' compensation insurer's motion for summary judgment and the Court of Civil Appeals affirmed. *Id.* at 291. The Supreme Court reversed and remanded, finding Shelton was in the course and scope of his employment when he was injured. In its analysis, the Supreme Court stated,

> [Shelton] was furthering the affairs of his employer by going to Dallas and also by spending the night and eating there so as to be ready to continue his trip the following day. The question to be decided then is whether crossing the street to obtain food was so related to the work he was employed to do that it might properly be concluded that his injuries had to do with and originated in the employer's business.

Id. at 292.

The Court continued, "It could not be seriously contended that [Shelton], while crossing the street, was in the scope of his employment for establishing liability under the doctrine of respondeat superior, but our Workmen's Compensation Act must be given a liberal construction to carry out its evident purpose." *Id.* at 293. The Court observed that "[f]ood and sleep were necessary if [Shelton] was to perform the work for which he was hired, and under the terms of his employment contract he was permitted to stop and satisfy these physical needs and was paid the expenses incident thereto." *Id.* at 294. Further, the Court stated, "By the very nature of the employment . . . the place and circumstances of his eating and sleeping were dictated to a large degree by contingencies inherent in the work." *Id.*

Zurich argues that because it involved out-of-town travel, *Shelton* is inapplicable. We disagree. As in *Shelton*, food and drink were necessary for Miller to perform his job, and the circumstances that dictated where he got that food and drink were dependent on his workday and the location of his deliveries. Like Shelton, Miller set out on foot for a nearby establishment to get food while his truck was being unloaded, and he was injured on the way. Shelton was "permitted to stop and satisfy [his] physical needs" during the workday. Similarly, Miller's summary judgment evidence established it was expected that he would leave his truck during the workday as necessary to obtain food and drink and use the bathroom. As noted, Zurich did not proffer any summary judgment evidence to the contrary.

4. The Trespass Issue

Zurich argues that because Miller "broke the law during this deviation" to obtain food, drink, and cash, he did not sustain a compensable injury. It contends that Miller was trespassing on private railroad company property and that there was a "no trespassing" sign in the area when Miller attempted to cross the tracks.[24] Zurich states this is a Class C misdemeanor.

[24] Zurich's summary judgment evidence shows a "danger" sign was in the vicinity of the accident. Miller testified during the contested case hearing that he did not see any warning signs at the crossing. Zurich "did not dispute [Miller] may not have seen any warning signs."

Zurich cites a single Texas case in support of its argument: *Martinez v. State Office of Risk Management*, 582 S.W.3d 513 (Tex. App.—San Antonio 2018, pet. denied).[25] Zurich concedes the case does not involve "a criminal violation such as trespass on railroad property" but, rather, pertains to an employee's "violation of statutory language regarding the ability of a state worker to work at home." In *Martinez*, the court held the language of the Government Code "limit[s] a state employee's scope of employment by mandating that the state employee obtain prior written authorization before working at home." *Id.* at 525. *Martinez* is thus inapposite.

Assuming, without deciding, Miller was trespassing when he was injured, it does not factor into our analysis, as Zurich did not cite, and we are not aware of any authority indicating the commission of a misdemeanor is an affirmative defense to compensability under the Act.

We overrule Zurich's first and second issues.

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[25] Zurich also relies on a Kentucky Supreme Court case in which an employee who was injured while walking in front of a moving vehicle between intersections during a lunch break was found to have "voluntarily exposed herself to a hazard that was completely outside those normally encountered" in her employer's business. *U.S. Bank Home Mortg. v. Schrecker*, 455 S.W.3d 382, 386 (Ky. 2014). The employee was found not to have been in course and scope of her employment. *Id.* Even if *Schrecker* were from a Texas court, we would question its applicability here because even if the employee's injury is caused by "willful negligence or gross negligence," it does not rise to the level of "intentional injury necessary to avoid the effect" of the Act. *See Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex. 1981).

Conclusion

We hold that Miller was acting in the course and scope of his employment when the accident occurred and he thus sustained a compensable injury. We hold the district court did not err in granting summary judgment in favor of Miller and in denying Zurich's hybrid summary judgment motion.

We affirm the district court's judgment.

Veronica Rivas-Molloy
Justice

Panel consists of Justices Hightower, Rivas-Molloy, and Farris.